

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 4623 of 1991****For Approval and Signature:****HON'BLE MR.JUSTICE D.A.MEHTA****HON'BLE MS.JUSTICE H.N.DEVANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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AP KHAMBHATTA - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

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Appearance :

MR SB VAKIL, Sr. Advocate with Ms. Archana Acharya for Petitioner
MS ARCHANA R ACHARYA for Petitioner No(s).: 1 - 1.
NOTICE SERVED for Respondent No(s).: 1, 2,3.

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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 07/07/2005

ORAL JUDGMENT

(Per : HON'BLE MS.JUSTICE H.N.DEVANI)

1.This petition under Article 226 of the Constitution of India challenges:

(1) the show cause notice F.No.V.16(17)78/VC/86 dated 17/2/1988 issued by the Assistant Collector of Central Excise, Rural Division, Ahmedabad, Respondent No.2 herein, and,

(2) the show cause notice F.No.V.21/15-47/Dem/91 dated 4/6/1991 issued by the Collector of the Central Excise & Customs, Ahmedabad, Respondent No.3 herein.

2.The petitioner, M/s Pioma Industries, a proprietary concern, is engaged in the manufacture of Rasna Soft Drink Concentrate (RSDC) since February 1984. Consequent to the coming into force of the Central Excise Tariff Act, 1985 with effect from 20th February 1986, the Assistant Collector, respondent No.2 vide notices dated 20th February 1986 and 25th February 1986 called upon the petitioner to observe the Central Excise formalities, as their product RSDC was liable to be classified under Heading 21.07 of the Schedule to the Central Excise Tariff Act, 1985 as “edible preparation, not specified elsewhere and included”, chargeable to duty at 15% ad-valorem under S.H. 2107.91.

3.The petitioner challenged the aforesaid two notices by way of a writ petition before this Court, being

Special Civil Application No.1205 of 1986. This Court, by its order dated 28th April 1987, disposed of the petition, inter alia, directing the Department to issue a show cause notice and the petitioners to cooperate in the adjudication thereof.

4.By a show cause notice dated 17th June 1987, the respondent No.2, called upon the petitioners to show cause as to why RSDC should not be classified under Heading No.21.07 as edible preparation not elsewhere specified or included and chargeable to duty at 15% ad-valorem under sub-heading 2107.91 with effect from 28/2/1986 and why the petitioners should not pay the short levy / non-levy of duty of Rs.2,06,13,031.01 ps. for the period from March 1986 to April 1987 and why the said amount should not be recovered from the petitioners under Section 11(A) of the Central Excises and Salt Act, 1944 read with sub-rule (2) of Rule 9 of the Central Excise Rules, 1944. At the relevant time, when the petition was filed the said proceedings were pending before the Collector (Appeals).

5.By the impugned show cause notice dated 17th February 1988 issued by the respondent No.2, the petitioners were called upon to show cause as to why the Rasna Soft Drink Concentrate manufactured by

them should not be classified under Heading No.21.07 as edible preparations not elsewhere specified or included and chargeable to duty at 15% ad-valorem under sub-heading 2107.91 and why they should not pay the short levy / non-levy of duty of Rs.17,81,445=00 for the period from May, 1987 to December, 1987 and why the said amount should not be recovered from the petitioners under Section 11(A) of the Central Excises and Salt Act, 1944 read with sub-rule (2) of Rule 9 of the Central Excise Rules, 1944.

6.In response to the said show cause notice, the petitioners submitted their reply dated 15th March 1988. Thereafter, it appears that the respondent No.2 had issued ten further show cause notices for successive periods, out of which about seven show cause notices had been disposed of. However, the proceedings pursuant to the impugned show cause notice dated 17-2-1988 were pending.

7.The cause of action for filing the present petition arose when the petitioners were served with a show cause notice dated 4th June, 1991 issued by the respondent No.3, Collector of Central Excise & Customs, which was identically worded to the show cause notice dated 17-2-1988 and was also in

relation to the same period and amount. Being aggrieved by the initiation of parallel proceedings by two different authorities in respect of the same subject matter, the petitioners have moved the present petition.

8. On 9-8-1991, this Court while admitting the petition, passed the following order ;

“Rule. Considering the facts stated in the petition, by way of interim order, it is directed that the Assistant Collector of Central Excise, Ahmedabad, will not proceed further with the show cause notice (Annexure “A”) dated 17th February, 1988. It would be open to the Collector to proceed further with the show cause notice dated 4-6-1991.”

9. Heard Mr.S.B.Vakil, learned Senior Advocate, appearing with Ms. Archana Acharya, on behalf of the petitioners. Though served, there is no appearance on behalf of the respondents.

10. The learned Senior Advocate stated that no further action has been taken in respect of the show cause notice dated 4th March 1991, despite the fact that this Court by the aforesaid order dated 9-8-1991 had left it open to the Collector to proceed with the same. The learned counsel placed on record a copy

of Final Order No.E/455 to 462/94-D and Misc. Order No.M-182 to 189/94-D dated 30-11-1994 passed by the Customs, Excise & Gold (Control Appellate) Tribunal, New Delhi in the petitioner's own case, in similar matters pertaining to different periods.

11. It would be pertinent to refer to the following observations of the Tribunal in the said order:

“Appearing on behalf of the appellants, Shri Rakesh Gupta, advocate, duly assisted by Shri Kamal Trivedi, advocate, submitted that the classification of the subject product, as aforesaid, in the present appeals relates to the period from 1.3.1986 to 31.1.1990. In all, eight show cause notices were issued by the Assistant Collector of Central Excise concerned to the appellants for the different periods and the same were adjudicated by him by eight different Orders-in-Original. Against which eight separate appeals were filed before the Collector (Appeals) who disposed of the same appeals by its impugned common Order-in-Appeal dated 15-10-1991 (issued on 21-10-1994). He further submitted that the Central Board of Excise and Customs, New Delhi, has issued a Circular No.23/13/93 dated 20th December 1993 under Section 37-B of the Central Excise and Salt Act, 1944 inter alia observing that for the purpose of ensuring uniformity in classification the “Synthetic Soft Drink Concentrate”

packed and marketed, as mentioned in para 2 of the Circular shall be classified under sub-heading 2107.99 of the Tariff. This Circular has been issued subsequent to the passing of the impugned order. He further submitted that since the appellants are also packing and marketing the Synthetic Soft Drink Concentrate, as mentioned in para 2 of the said Circular dated 20th December 1993, the same may be classified under sub-heading 2107.99 of the Tariff and, therefore, the relief claimed in the present appeals be moulded accordingly being based on subsequent events."

12. The Tribunal disposed of the said applications in the following terms :

"In the result, all the captioned applications stand disposed of as indicated above, and the case is remanded to the concerned Assistant Collector of Central Excise, Ahmedabad, for de novo adjudication in the light of the said Circular dated 20th December, 1993, referred to above, after following the principles of natural justice and the direction given above."

13. The learned counsel also placed on record an order dated 12th July 1995 passed by the Assistant Commissioner, Central Excise, Rural Division, Ahmedabad, pursuant to the aforesaid order of

remand passed by the Tribunal. The Assistant Commissioner, after hearing the parties, has held as follows :

“On perusal of CBEC Circular dated 20/12/1993, a question arises as to whether this circular under which it has been directed that soft drink concentrate manufactured and marketed as per process given in para 2 shall henceforth be classified under subheading No.2107.99 of Central Excise Tariff is applicable to cases under consideration.

The answer to this question is to be found in CEGAT's and Collector (Appeals) remand orders and department's directions in similar circumstances in the past. So far as CEGAT's remand order is concerned, a perusal of para 5 of this order will clarify that it was pointed out by departmental representative to Hon'ble CEGAT that the CBEC circular dated 20/12/93 may be applicable only for future. The fact that in spite of this contention of departmental representative, CEGAT has found it fit to order de novo adjudication of matter pertaining to period 1986-90 in light of this circular, makes it clear that intention of CEGAT is to apply the circular in the present case also. This view is further strengthened on perusal of para 8 wherein a reference is made to Apex Court's remark that court must take notice of subsequent events if it has a fundamental impact on the light to

relief. In the same para, CEGAT has allowed both the parties to amend their pleadings if they so want which gives an impression that even though the classification under subheading No.2107.99 now decided by the Board was never claimed by the assessee earlier, the assessee is now free to do so.

Since Collector (Appeals) has followed the remand order of CEGAT and has also directed to apply the principle of contemporaneous exposition, the same logic can be applied to the period covered by Collector (Appeals), remand order.

Moreover, as contended by the assessee, the instructions contained in Ministry's circular No.2/92-CE I dated 31/12/93 which clarified that Board's order no.8/92 dated 24/9/92 cannot change the position for past closed assessments but would be applicable only to cases which are pending decision is relevant here. This is because the order No.8/92 provided for classification in a particular subheading from date of issue but by ministry's clarification, was made applicable to pending cases. Therefore, I am of the opinion that the circular dated 20/12/93 can be made applicable to cases covering the cases prior to issuance of circular only if the assessments for this period are not closed.

It will be pertinent to examine whether or not the cases covered by two remand orders can be considered to be closed

assessments.

It is relevant to note that assessee had not obtained Central Excise licence during the period covered by two remand orders i.e. March 1986 to September 1991 and had not filed Classification Lists under Rule 173B had not filed Price Lists under Rule 173C and had not filed RT-12 Returns under rule 173G(3), in terms of relief obtained from Gujarat High Court in various proceedings as discussed earlier. Since Returns envisaged under Rule 173G(3) were not submitted by the assessee, no assessment was made by the proper officer under Rule 173 I during the period covered by the two remand cases.

According to Rule 2 of Central Excise rules, 1944, the term "assessment" means assessment of duty made by proper officer and includes re-assessment, provisional assessment under rule 9B, summery assessment under rule 37A, best judgement assessment under Rule 173 Q and any order of assessment in which the duty assessed is nil.

Thus, in the cases under consideration no assessment was done within the meaning of definition of assessment given in Rule 2 of Central Excise Rules 1944.

The show cause notices were issued on the basis of figures of clearances furnished by the assessee and the orders issued on these show cause

notices have been remanded by CEGAT and Collector (Appeals) to the Assistant Collector for denovo adjudication. Therefore, it is clear that in the cases covered by two remand orders, the assessments are not closed as no assessment within the meaning of Rule 173 I read with Rule 2 (ia) was done and classification of product in question is to be decided afresh.

Therefore, on the basis of Cegat's directions and on application of instructions contained in Ministry's Circular No.2/92-CXI, I am of the opinion that Board's circular dated 20-12-1993 will be applicable to cases covered by two remand orders. Once it is accepted that the Board's circular dated 20/12/93 is applicable to two remand cases, the next step would be to examine whether the assessee's product under consideration was indeed covered by said circular for the period March 1986 to Septe. 1991. This essentially boils down to examining as to whether Rasna Soft Drink Concentrate was manufactured and marketed during the relevant period as per process detailed in para 2 of the said circular.

To this, the assessee has contended that this could be verified at the factory and could also be gathered from their pleadings before Assistant Collector & Collector (Appeals) at various occasions during adjudication proceedings. The Range Superintendent in charge of the assessee's unit after examination of factory as confirmed that the assessee

was manufacturing and marketing Rasna Soft Drink Concentrate as per process detailed in para 2 of the circular during the period under consideration. A perusal of assessee's pleadings on various occasions during adjudication proceedings before Assistant Collector and Collector (Appeals) also corroborates these findings of Range Superintendent.

In view of these findings, I am of the opinion that the assessee's product Rasna Soft Drink Concentrate is correctly classifiable under sub-heading No.2107.99 of CETA, 1985 for the period March 1986 to April 1987 and January 1988 to September 1991, and chargeable to Nil rate of duty as per CETA, 1985. I therefore pass the following order:

:: ORDER ::

I, hereby hold that the product Rasna Soft Drink Concentrate is correctly classifiable under subheading No.2107.99 and chargeable to Nil rate of duty for the period covered by SCN's listed in Annexure A. The demands raised vide these SCN's are accordingly dropped."

14. As can be seen, the show cause notice dated 17/6/87 for the period from March 1986 to April 1987 is identically worded to the impugned show cause notices, except that the period and amount involved are different. The show cause notice dated 17/6/87

has culminated into the order dated 12th July, 1995 passed by the Assistant Commissioner, Central Excise, Ahmedabad, which is borne out from Annexure "A" to the said order, wherein the show cause notice dated 17/6/87 for the period 3/1986 to 4/1987 and for demand of Rs.2,06,13,031=05 is listed at Serial No.1. By the said order, it has been held that the product Rasna Soft Drink Concentrate is correctly classifiable under sub-heading No.2017.99 and chargeable to nil rate of duty for the period covered by the show cause notices listed in Annexure "A" to the order and the demands raised vide the said show cause notices are dropped.

15. In the facts of the present case, the Collector has not proceeded further pursuant to the impugned notice dated 4/6/1991. The Assistant Commissioner has, in the aforesaid order dated 12/7/95 passed in relation to the prior and subsequent periods, recorded a finding that, *"during the period covered by the two remand orders i.e. March 1986 to September 1991, the assessee had not obtained Central Excise Licence and had not filed a Classification Lists under Rule 173B and not not filed Price Lists under Rule 173C and had not filed RT-12 Returns under rule 173G(3). That since Returns envisaged under Rule 173G(3) were not submitted by*

the assessee, no assessment was made by the proper officer under Rule 173 I during the period covered by the two remand cases. Thus, in the cases under consideration, no assessment was done within the meaning of definition of assessment given in Rule 2 of the Central Excise Rules, 1944". As can be seen, the finding that there was no assessment made by the proper officer for the period March 1986 to September 1991, also covers the period involved in the impugned show cause notices i.e. May 1987 to December 1987.

16. From the order of the Assistant Commissioner it is apparent that he has examined the applicability of the CBDT Circular for the period between March 1986 to September 1991 and has observed that the Range Superintendent in-charge of the assessee's unit after examination of the factory has confirmed that the assessee was manufacturing and marketing Rasna Soft Drink Concentrate as per process detailed in para 2 of the circular during the period under consideration. Accordingly, he had arrived at the opinion that the assessee's product Rasna Soft Drink Concentrate is correctly classifiable under sub-heading No.2107.99 of CETA, 1985 for the period March 1986 to April 1987 and January 1988 to September 1991, and chargeable to Nil rate of duty

and accordingly dropped the demand raised vide the said show cause notices.

17. As can be seen from the findings recorded by the Assistant Commissioner, the same also covers the period involved in the impugned show cause notices i.e. May 1987 to December 1987. Accordingly, the classification of the assessee's product held for the period March 1986 to April 1987 and January 1988 to September 1991 as held vide aforesaid order of the Assistant Commissioner would also be applicable to the period in question.

18. In the facts and circumstances stated above, when in identical circumstances, after adjudication, the show cause notices have been dropped, no fruitful purpose would be served if the respondents are permitted to proceed further with the impugned show cause notices.

19. Accordingly, the petition is allowed. The impugned show cause notices dated 17th February 1988 and 4th June 1991 are quashed and set aside. Rule is made absolute accordingly with no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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